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NO. 93-1710

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

KENTUCKY — PETITIONER

versus

ALFRED GRAYSON THOMAS — RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

Respectfully submitted,

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QUESTIONS PRESENTED

I.

DOES THE FOURTEENTH AMENDMENT GUARANTEE A CRIMINAL DEFENDANT A RIGHT TO STRIKE QUALIFIED JURORS BY PEREMPTORY CHALLENGE?

II.

DOES THE EIGHTH OR FOURTEENTH AMENDMENT GUARANTEE A CAPITAL DEFENDANT A RIGHT TO MISINFORM THE JURY CONCERNING ITS SENTENCING RESPONSIBILITY?

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The Commonwealth of Kentucky, by its Attorney General, respectfully petitions this Court for a writ of certiorari to review the opinion of the Kentucky Supreme Court vacating respondent's conviction and sentence and remanding his case for a new trial.

OPINION BELOW

The opinion below is reported as Thomas v. Commonwealth, Ky., ___S.W.2d ___ (1993). The Kentucky Supreme Court's May 27, 1993 opinion is reproduced at pages 1-52 of the appendix accompanying this petition. At page 53 of that

appendix is the September 30, 1993 order denying Kentucky's petition for rehearing.

A four-Justice majority of the Kentucky Supreme Court vacated[1] this case for a new trial. The majority found constitutional error on two grounds: jury selection and the giving of certain information concerning the jury's role in sentencing. No other ground garnered a majority vote for reversal.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a). Kentucky's timely petition for rehearing of the opinion below was denied September 30, 1993 (A53). The deadline for filing this petition for writ of certiorari was extended to January 8, 1994 by order dated January 4, 1994. This petition was timely filed on January 7, 1993.

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[1]The first page of the majority opinion is "reversing and remanding" (A1), while the final page of the same opinion is "vacat[ing]" and "remand[ing]" (A31). It is a distinction without a difference for purposes of this case.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides that:

"Excessive bail shall not be required, nor excessive fines imposes, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution of the United States in relevant part provides that:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Respondent and an accomplice murdered, mutilated, and gutted a 75-year-old woman in the course of burglarizing her home, which they burned to the ground.

Respondent had planned a robbery of the victim. (TE 35, 334, 374). Respondent provided the knives which were used to kill the victim. (TE 359, 457). Respondent and his accomplice tore breakers off the outside of the house, cutting off the

electricity. They cut the telephone and satellite dish wires. They entered the basement and began tossing canned food jars outside through the windows. (TE 335).

When the victim fled her home respondent said, "We gotta kill her." (TE 336). They caught up with her 150 yards away. (TE 394, 407). Respondent reached the victim first. He slashed her throat. Respondent's accomplice then began slashing, cutting, and carving the victim. (TE 336). At some point during this ordeal the victim prayed aloud: "[P]lease, oh dear Lord, help me. Please, oh dear Lord, forgive me." (TE 344).

The wounds inflicted on this woman included:

(1) Seven wounds to the chest and abdomen. Two of these were to the left breast and another was to the right breast. Two wounds in the right abdomen were below the rib cage. Two wounds jointed into a "Y" shape. They started at

the nipple line and extended 21 inches down through the chest and abdomen to the pubic bone. The bowel and other internal structures were partially eviscerated. She was literally disemboweled.

(2) Three wounds to the throat. The deepest of these cut through the voice box, severed the carotid artery, and penetrated through the esophagus.

(3) Three wounds to the face, one of which extended from the right eye to the jaw.

(4) Six wounds to the left buttock.

(5) Two wounds to the right buttock.

(6) Eight wounds to the bend of the left knee.

(7) Nine wounds to the bend of the right knee, one of which severed a major artery. Several muscles were also severed.

(8) Five wounds to the back of the scalp.

(9) Three wounds to the left hand.

(10) Beyond the 46 wounds listed above there were numerous scratches and abrasions on the victim's left shoulder. (TE 468-469, 475, 478).

Having slaughtered the victim, respondent and his accomplice took what they could find before setting the house on fire. (TE 295, 336, 339, 341, 342).

Respondent's accomplice was 16 years old. He testified against respondent in exchange for a 30-year plea bargain. (TE 356-357).

The trial judge imposed the jury's recommended sentence of 18 years for the burglary and death for the murder. (TE 603).

REASONS FOR GRANTING CERTIORARI

I.

CRIMINAL DEFENDANTS DO NOT HAVE A DUE PROCESS RIGHT TO STRIKE QUALIFIED JURORS BY PEREMPTORY CHALLENGE.

The Kentucky Supreme Court has implicitly undertaken to answer the question expressly left

open by this Court in footnote 4 of Ross v. Oklahoma, 487 U.S. 81 (1988). In doing so, the Kentucky Supreme Court has misinterpreted Ross as a pronouncement of this Court that criminal defendants enjoy a federal "due process" (A27) right to peremptory challenges. The Kentucky Supreme Court erroneously relies on Ross as authority that any denial or impairment of state-created procedural rights to peremptories is, perforce, a federal constitutional violation. (A27). According to the Kentucky Supreme Court, Ross entitles a defendant to not use a peremptory against any juror who is either unqualified, or who is qualified but "undesirable"[2] to the defense. Under the

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[2]Apparently an "undesirable" (A9, 16, 18, 19) is a juror who properly survives a defense challenge for cause, or who is not challenged at all but in retrospect may have been less than enthusiastic for the defense. Two jurors were referred to as "undesirables" (A9) because their responses were equivocal, though not enough to precipitate a challenge for cause. (A7). Three other jurors were labeled "undesirable" for the same reason. (A18). The Kentucky Supreme Court ventures that, "It is just as likely, if not

Kentucky Supreme Court's analysis, Ross recognizes a due process right to reserve peremptories exclusively for qualified (and otherwise "desirable") jurors. This misapplication of Ross even caused a conclusion that respondent, when offered the functional equivalent of an additional peremptory to remove an objectionable juror[3] before deliberations,

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more so, that there were jurors on the panel other than those challenged for cause who, for some reason not rising to the level of a challenge for cause, known only to the [respondent's] attorney, were even more undesirable than the ones who should have been excused for cause." (A19).

[3]Juror Larry Dixon survived a defense challenge for cause. Fourteen jurors were empanelled, including two alternates. Before the alternates were randomly drawn so that the remaining 12 jurors could begin deliberations, the prosecution offered to join respondent's prior challenge for cause as a cautionary measure. The offer was that juror Dixon be removed as one of the alternates. Respondent's counsel declined: "I would withdraw my challenge to Larry Dixon. I've been observing him during the trial and I think he has been a very observant juror and at this time I would waive the objection that I had earlier. I have noticed that he has been particularly attentive in this trial. In watching him, I have been pleased with this -- I've been pleased with his performance." (TE 482).

was entitled not to use it but could later complain on appeal that the particular juror decided his case. (A16-17).

In Ross the defendant used one of the nine peremptory challenges given under Oklahoma law to remove a juror who should have been excused for cause. This Court granted certiorari to consider whether the failure to excuse that juror for cause or the defendant's use of a peremptory to strike that juror violated the impartial jury requirement of the Sixth and Fourteenth Amendments or the due process clause of the Fourteenth Amendment. 487 U.S. at 85. Noting that the peremptory removal of that juror resulted in an impartial panel, this Court found no violation of the constitutional right to an impartial jury. Id. at 86-87. The failure to remove that juror for cause was an error cured by the use of a peremptory strike, "But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We

have long recognized that peremptory challenges are not of constitutional dimension." Id. at 88.

More pertinent to the present case is this Court's analysis of the due process claim advanced in Ross. There the Court rejected the defendant's due process claim based on the narrowest ground possible: within the context of the strict limitations that Oklahoma law places on the use of peremptory challenges.

> As required by Oklahoma law, petitioner exercised one of his peremptory challenges to rectify the trial court's error, and consequently he retained only eight peremptory challenges to use in his unfettered discretion. But he received all that Oklahoma law allowed him, and therefore his due process challenge fails.

Id., 487 U.S. at 90-91.

In footnote 4 of that opinion this Court expressly left open the question addressed by the Kentucky Supreme Court in the present case:

> We need not decide the broader question whether, in the absence of Oklahoma's limitation on the "right" to exercise peremptory challenges, "a denial or impairment" of the exercise of peremptory challenges occurs if the defendant uses one or more

> challenges to remove jurors who should have been excused for cause. See Swain v. Alabama, 380 U.S. 202, 219 (1965); cf. Spies v. Illinois, 123 U.S. 131 (1887); Stroud v. United States, 251 U.S. 380, 382 (1920), denying rehearing to 251 U.S. 15 (1919).

Ross, supra, 487 U.S. at 91, n.4.

This Court should grant certiorari to determine the "broader question" left open in Ross, supra at 91, n.4. In decisions prior to the opinion below, the Kentucky Supreme Court has interpreted Ross oppositely. In Turpin v. Commonwealth, Ky., 780 S.W.2d 619, 622 (1989) the Kentucky Supreme Court specifically cited the page (487 U.S. at 91) in Ross dealing with the due process aspect of the claimed peremptory violation:

> Turpin can demonstrate no prejudice or constitutional violation because the [undesirable[4]] jurors were removed by peremptory challenge by the defense. In Ross, supra, the U.S. Supreme Court found that even

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[4]See footnote 2, ante. Three prospective jurors were challenged for cause. Turpin, supra, 780 S.W.2d at 621.

> though a state court trial judge had acted erroneously in refusing to dismiss the prospective juror for cause, the error did not deprive the defendant of an impartial jury or any entitlement under state law because he used a peremptory challenge to remove the prospective juror. 487 U.S. 81 at 91[.]

The Kentucky Supreme Court reaffirmed its adherence to Ross in Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 669 (1990), and yet again in Dunbar v. Commonwealth, Ky., 809 S.W.2d 852, 853-854 (1991). Following the lead of the Kentucky Supreme Court in its application of Ross, the Kentucky Court of Appeals published Williams v. Commonwealth, Ky.App., 829 S.W.2d 942, 943 (1992):

> Williams now claims he was denied a fair trial because he was forced to use a peremptory challenge as opposed to having this juror struck for cause. We find no prejudicial error. The juror in question did not sit on this panel, and it appears that Williams was accorded an impartial jury. There was no violation of a constitutional right in this sense. Ross v. Oklahoma, 487 U.S. 81[.]. See also Turpin v. Commonwealth, Ky., 780 S.W.2d 619 (1989), cert.denied, 494 U.S. 1058[.]

The opinion below represents a complete flipflop from Kentucky's application of Ross in Turpin, 780 S.W.2d at 621-622, Sanders, 801 S.W.2d at 669, Dunbar, 809 S.W.2d at 853-854, and Williams, 829 S.W.2d at 943. In the opinion below the Kentucky Supreme Court accounts for this turnabout by attributing its earlier rulings to "a misunderstanding of the United States Supreme Court decision in Ross v. Oklahoma [supra]." (A22). The Commonwealth of Kentucky submits that its state appellate courts were correct the first four times and that the opinion below is the incorrect application of Ross.

In the opinion below the Kentucky Supreme Court renounces Ross by attempting to distinguish Kentucky law from Oklahoma law. The majority opinion below declares that "Kentucky law has always been to the contrary" (A23) of the Oklahoma requirement that an unqualified juror survive the exhaustion of peremptory challenges. Ross, 487 U.S. at 89. The author

of that declaration in the majority opinion below had made the same point in his dissent in Turpin, supra, 780 S.W.2d at 626-627, and Dunbar, supra, 809 S.W.2d at 856-857.

As authority for that distinction, the majority opinion below cites two practice manuals and three civil cases, none of which would appear to distinguish Kentucky law from Oklahoma law. The criminal practice manual cited at A24 stresses the importance of exhausting one's peremptory challenges in order to preserve an unsuccessful challenge for cause. The opinion below at A24 quotes the passage from that criminal practice manual without indicating that the quoted language ends with a footnote. That footnote, in turn, refers to Lefevers v. Commonwealth, Ky., 558 S.W.2d 585 (1977). In Lefevers there was no error in the defendant's having had to use three peremptories to strike a juror who "stated she would be prejudicial", a juror who stated that the burden was on the defendant to prove his innocence, and a juror employed as a part-time city police

court judge. Id. at 587. Lefevers cited prior Kentucky caselaw holding that no prejudice occurred because the use of peremptories resulted in those jurors not being empaneled. Id. at 588. It should also be noted that the opinion below at A24 cites the 1987 edition of the criminal practice manual but makes no mention of the January 1993 pocket part, which cites Turpin v. Commonwealth, supra 780 S.W.2d 619. The civil practice manual quoted from at A24-25 merely emphasizes the importance of "effectively" and "intelligently" exercising peremptory challenges and challenges for cause. In Olympic Realty Co. v. Kamer, 283 Ky. 432, 141 S.W.2d 293 (1940), cited at A25 of the opinion below, neither peremptories nor challenges for cause were made because the untruthfulness of three jurors was not revealed until after the verdict. In Penker Construction Company v. Finley, Ky., 485 S.W.2d 244 (1972) and Ky. Farm Bureau v. Cook, Ky., 590 S.W.2d 875 (1979), relied on below at A26-27, the issue was the proper allocation of peremptory challenges where

multiple parties occupy one side or the other of a lawsuit.

The opinion below does not acknowledge the existence of Rigsby v. Commonwealth, Ky., 495 S.W.2d 795 (1973), which had been addressed by the dissent in Turpin, supra, 780 S.W.2d at 626. Rigsby held that no error occurs unless a juror who survives a proper challenge for cause is empaneled after exhaustion of peremptories. 495 S.W.2d at 798-799. Rigsby is cited with approval in Lefevers, supra, 558 S.W.2d at 587. There is also Williams, supra, 829 S.W.2d at 943:

> In order to prevail on this issue, Williams must demonstrate that all of his peremptory challenges were exhausted and that an incompetent juror was allowed to sit who should have been struck for cause. Marsch v. Commonwealth, Ky., 743 S.W.2d 830 (1987). Williams does not complain that any incompetent juror sat, nor was he required to exhaust his peremptory challenges in order to eliminate all suspected prejudicial errors.

It is of course the prerogative of Kentucky's highest state court to change its own law, even if for the purpose of distinguishing

itself from Oklahoma. Whether the law in Kentucky has always been this way or whether the opinion below marks a change, the result is that the Kentucky Supreme Court has most recently misinterpreted this Court's analysis in Ross v. Oklahoma.

This Court's due process analysis in Ross begins with the premise that the Fourteenth Amendment does not create a right to peremptory challenges:

> Because peremptory challenges are a creature of statute and are not required by the Constitution, [citation omitted], it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. [Citations omitted]. As such, the "right" to peremptory challenges is "denied or impaired" only if the defendant does not receive that which state law provides.

487 U.S. at 89.

The language quoted above in Ross refers to Frazier v. United States, 335 U.S. 497, 505, n.11 (1948):

> The right is in the nature of a statutory privilege, variable in the number of challenges allowed,

> which may be withheld altogether without impairing the constitutional guaranties of an "impartial jury" and a fair trial. [Citations omitted.]

There is no constitutional right to peremptory challenges of any number or at all. Consequently, any improper denial or impairment of state-created peremptory challenges is a violation of state law and is not of constitutional dimension. In the opinion below the Kentucky Supreme Court has elevated a matter of state law to one of federal constitutional magnitude by misinterpreting this Court's decision in Ross v. Oklahoma. This Court should grant certiorari to determine the "broader question" left open in Ross, 487 U.S. at 91, n.4.

II.

THE EIGHTH AND FOURTEENTH AMENDMENTS DO NOT ENTITLE A DEFENDANT TO MISINFORM THE JURY CONCERNING ITS ROLE IN CAPITAL SENTENCING.

As an additional ground for granting respondent a new trial, the Kentucky Supreme Court determined that the jury's sense of responsibility in capital sentencing was

impermissibly minimized. The Kentucky Supreme Court based that determination on the jury's having received accurate information concerning its role in capital sentencing. According to the Kentucky Supreme Court, "The decision of the United States Supreme Court in Caldwell v. Mississippi, 472 U.S. 320 [ ] (1985), initiated this controversy". (A28).

The information given to the jury which the opinion below condemns as constitutional error is accurate. During closing arguments the prosecutor asked the jury to "recommend" the death penalty. (TE 524, 588). The trial court's instructions to the jury also referred to the verdict as a recommendation. (A30). The foregoing information is correct. Under Kentucky law the jury "recommends" a sentence:

> In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury . . . . Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall

> retire to determine whether any mitigating or aggravating circumstances, as defined in subsection (2) of this section, exist and to recommend a sentence for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

Ky. Rev. Stat. 532.025(1)(b). [Emphasis added.]

A jury's verdict of death in Kentucky is a recommendation which is not binding on the trial judge. Gall v. Commonwealth, Ky., 607 S.W.2d 97 (1980).

Ky. Rev. Stat. 532.030 specifically requires that the jury be instructed in the same manner in which the trial court instructed respondent's jury:

> In all cases in which the death penalty may be authorized the judge shall instruct the jury in accordance with subsection (1) of this section. The instructions shall state, subject to the aggravating and mitigating limitations and requirements of KRS 532.025 that the jury may recommend upon a conviction for a capital offense a sentence of death, or a term of imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty-five (25) years of his

> sentence, or a sentence of life, or to a term of not less than twenty (20) years.

Ky.Rev.Stat. 532.030(4). [Emphasis added.]

Instructions using the same language as contained in a statute are entirely proper. Riis v. Commonwealth, Ky., 418 S.W.2d 396 (1967).

Some six months after the February 29, 1988 commencement of this trial, the Kentucky Supreme Court announced in Tamme v. Commonwealth, Ky., 759 S.W.2d 51 (1988) that the word "recommend" must no longer be used in reference to a capital sentencing jury's verdict. In Tamme the Kentucky Supreme Court specified that its new requirement of using the word "fix" instead would have prospective application only. 759 S.W.2d at 53.

Concluding that the use of the word "recommend" was constitutional error, the court below refused to consider whether other language used to describe the verdict in this case rendered the error harmless. E.g., "you have the duty to set the sentence" (TE 587); "make the decision what the appropriate punishment

should be" (TE 591); "You ain't recommending a sentence. It's your duty as jurors to set the sentence. When you put down on there what the sentence is going to be, that is the sentence." (TE 593); "you fix a sentence for Alfred Thomas." (TE 522).

The other correct jury information which the Kentucky Supreme Court determined to be error not subject to harmless error analysis was that there would be an automatic appeal. Juror Larry Dixon asked whether there would be an appeal. Before the trial judge could respond, defense counsel answered that the jurors must assume respondent would receive whatever sentence the jury decided. The judge and the prosecutor then responded that there would be an appeal. (TE 600). When defense counsel objected, the judge stated:

> I agree. I was going to explain that, that you shouldn't be concerned with that. You should give him the penalty that you think is appropriate under the evidence that you have heard and the instructions given you by the Court. You are not to be

> concerned by anything that might happen.

(TE 601).

Defense counsel then stated that appeals "do not go to the sentence or to what the jury did basically. What the jury does is final . . . . That is the nature of appeals. They do not go to the sentence. They do not review what the jury returns." (TE 601).

Ky.Rev.Stat. 532.075 provides for an automatic appeal in all cases where the death penalty has been imposed. The limited information given by the judge and by the prosecutor was correct. If any misleading occurred it was on the part of defense counsel.

The foregoing information does not amount to constitutional error under Caldwell v. Mississippi, as the Kentucky Supreme Court believes it does. (A28).

In Caldwell the prosecutor "forcefully argued" to the jury that "your decision is not the final decision" and "'[y]our job is reviweable.'" 472 U.S. at 325. In explaining

that the state supreme court automatically reviews all death sentences, the prosecutor in Caldwell scolded the defense for "'insinuating that your decision is the final decision'". Id. at 325-326. The trial judge in Caldwell expressly reinforced the prosecutor's minimization of the sentencing role of the jury. Id. at 325.

In Caldwell this Court found the prosecutor's argument to be "inaccurate, both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform." 472 U.S. at 336. The Caldwell Court also found that the information failed to advance a legitimate State goal under California v. Ramos, 463 U.S. 992 (1983).

The present case represents the flip side of the factual situation in Caldwell. Here the information was both accurate and it served a legitimate State interest without lessening the jury's sense of responsibility. Under Kentucky

law the death penalty cannot be imposed unless the jury "recommends" it. Kentucky judges may lower a sentence but they cannot increase the punishment. In contrast to Caldwell, here the automatic appeal was not emphasized but instead was minimized.

CONCLUSION

WHEREFORE, the Commonwealth of Kentucky respectfully urges this Court to grant certiorari.

Respectfully submitted,

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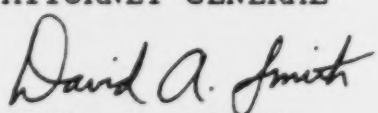

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